Supreme Court of the United States.

OCTOBER TERM, 1904.

Ex parte GERTRUDE GLASER, as Administratrix of the Goods, Chattels and Credits of ISADOR GLASER, deceased.	No. 16 Original.

Additional Brief of Petitioner.

Petitioner respectfully submits this additional brief to supplement the brief filed by petitioner with her petition, to which said first filed brief the petitioner begs again to call the Court's attention and request that it be first read by the Court in passing finally upon this motion.

Petitioner submits that no new facts are before the Court by reason of the return herein. The return is only the first four pages of the printed matter submitted in opposition to this motion. This return says (page 29):

> "That his (Judge Thomas's) reasons for denying the motion referred to in the petition are set forth in the order made thereon and which reads as follows:"

Then follows the order at length, the only reason set forth in it for denying the motion being "upon the sole ground that no action of Gertrude Glaser, as administratrix of the goods, chattels and credits of Isador Glaser, deceased, plaintiff, against Anthony P. Langer, is nor ever has been pending in this Court," that is, in the Circuit Court of the United States for the Eastern District of New York.

This does not traverse or deny any allegation of the petitioner.

The affidavits following the four pages of the return will not be considered by the Supreme Court except in so far as they are a verification of the return; they are not signed by the Judges or any of them; they do not purport to be a return but a verification by Cass (p. 12) for Langer, the defendant in said Circuit Court action. Said Cass evidently is acting therein for the defendant Langer and not for the Court (see pp. 1 and 2, subdivisions 3 and 4; p. 12, subdivision 20). But Langer has no right to make a return, nor has Cass nor the Clerk of the Circuit Court, either for themselves or for Langer. The affidavits are not, in fact, a verification of anything in the return, which alleges nothing not already alleged by the petition.

2. The return of Judge Thomas is a nullity; (1) since it denies nothing in the petition, and (2) is not verified by Judge Thomas nor by any one of the Judges to whom the order is directed, nor is any reason given why it is not so verified. The reason Cass gives for making the verification (that his client Langer is ignorant) is not stated to apply (and does not, in fact, apply) to Judge Thomas—who, of course, knows all about the application before him and his reasons for denying it.

3. For fear, however, that petitioner may be wrong in thinking the Court will disregard these affidavits and since said affidavits are inaccurate, petitioner's attorney submits at the close of this brief an affidavit replying to said affidavits of Cass and Benedict, and submits the following points of law upon the issues (if any) raised by said affidavits and deponent's affidavit. Petitioner relies

also on her brief submitted on her *ex parte* application for the order to show cause and now on file with this Court, and petitioner hereby begs this Honorable Court again to consider said brief in deciding the present motion.

4. The service of the answer and notice of appearing, constitute an appearance in a State Court of record and must under Section 914 of the U. S. Revised Statute also constitute an appearance in the Circuit Court.

See second point of petitioner's first brief.

Amy v. Watertown, 130 U.S., 301, in construing Section 914, U. S. Revised Statute, says that in the construction of a State Statute in a matter purely domestic (as is service of process) the Court is disposed to follow the State decisions.

Section 914 of the United States Revised Statutes says:

> "*The practice, pleadings and forms and modes of proceeding in civil causes other than Equity and admiralty causes* in the Circuit and District Courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held, *any rule of Court to the contrary notwithstanding.*"

The sworn petition of petitioner has alleged that according to the practice of the State Courts of Record and State Statutes on the subject and the State decisions, the act of Langer in *serving* the notice of appearance and copy of the verified answer on the attorney for Glaser would constitute an appearance. This is not denied by the return nor even by the affidavits attached to the return and is expressly admitted in the affidavit of Cass, in sub-

division 11, by the admission that the State Court practice does not require the filing of pleadings or notice of appearance to render service effective.

The New York Code, Section 824, does say that pleadings must be filed, but the duty is imposed on the pleader and the only penalty for not doing so is also expressed in the same Section, namely, that the opposite party *may* have it filed.

Counsel for petitioner has made an exhaustive search for cases on the subject of whether acts constituting an appearance in a State Court of Record are held by the United States Courts to constitute an appearance in law actions in Circuit and District Courts, but is unable to find any bearing directly on it, either for or against the position taken by petitioner; but the position of petitioner is clearly authorized by said Section 914, and under the very terms of that Section any rule of the Circuit Court of the Eastern District of New York to the contrary would be of no consequence. By rule 70 of the Eastern District Circuit Court the State Statutes are expressly adopted. (See Irving's affidavit, Subdivision 7).

It is respectfully submitted, however that the rules as printed in the affidavit of Benedict in support of his statement that the complaint, answer or other appearance in an action must be filed do not in fact support his position. The Clerk, by Rule 8, is directed to enter the defendant's appearance. The one served on the petitioner's attorney was tendered to the said Clerk by petitioner's attorney (subd. 10), and he refused to file it. There is no question here of an amended pleading. But even had the rule required the filing of the notice of appearance and even had the plaintiff in the Circuit Court action neglected to file it, the mere omission of this act would not deprive the Court of jurisdiction since the present State law (made

applicable by Section 914 of the Revised Statutes and by the very rules themselves of the Eastern District Court) says that the *service* of the notice of appearance on the attorney constitutes an appearance.

There is no magic virtue in the mere act of filing a notice of appearance or answer. When in the hands of the attorney—as much an officer of the Court as is the clerk—they are as valid and binding (if there is intent to appear) as if they were actually filed.

Petitioner contends that Section 421 of the New York Code taken with Section 914 of the Revised Statutes makes of it no consequence what the rule of the Circuit Court may be in so far as that rule is opposed to the State statute, but if said rule is to govern it must be taken as of the time when it was adopted, to wit, about 1865. At that time and up to 1881, Section 421 of the New York Code was not enacted, the only Statute provision being (139 of the then New York Code, corresponding to Section 424 of the present Code), that a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him. There was also however at that time a rule of the Supreme Court known as Rule 11, which provided:

> "Service of notice of appearance or retainer generally shall in all cases be deemed an appearance, and the plaintiff on filing such notice at any time thereafter with proof of service thereof may have the appearance of the defendant entered as of the time when said notice was served."

If the attorney for Langer refuses to be bound by the present State law (by which petitioner claims that he must be bound), he certainly must be bound by the State Rules, Statutes and practice in force at the time of the adoption of these Circuit Court Rules.

The following cases, most of them now overruled by Section 421 of the New York Code so far as New York practice is concerned, show the State practice in its Courts of Record at the time of the adoption of the Rules of the Circuit Court quoted by Mr. Benedict:

(a). Cases showing that appearance in the State Courts of Record is made by *service* of appearance or answer:

Reed v. Chilson, 142 New York 152, (not overruled).
Webb v. Mott, 6 Howard's Practice, 441.
Mulkins v. Clark, 3 Howard's Practice, 27.
Gardner v. Teller, 2 Howard's Practice, 241.
Hill v. Smith, 2 Howard's Practice, 242.
Roberts v. Willard, 1 New York Code Reporter, 101.
Legate v. Lagrille, 1 Howard's Practice, 15.

(b) Cases holding that appearance cures all defects in or even voidness or absence of process:

Cowenhoven v. Ball, 118 N. Y., 231 at 234 (not overruled).
Sprague v. Irwin, 27 Howard's Practice, 51 (defect).
Layton v. McConnell, 61 App. Div., 448 (not overruled).
Mulkins v. Clark, 3 Howard's Practice, 27 (defect).
Hill v. Smith, 2 Howard's Practice, 242 (void).
Legate v. Lagrille, 1 Howard's Practice 15 (void).
Seymour v. Judd, 2 New York, 464.
Smith v. Dipeer, 2 N. Y. Code Reporter, 70 (void or absent).
Paulding v. Hudson Co., 2 E. D. Smith (N. Y.) 38 (void).
Vernon v. Palmer, 48 Superior Ct., 229 at 235 (void).
Allen v. Malcolm, 12 Abbott N. S., 337 (void).
Wright v. Jeffry, 5 Cowen, 15 (defect).
Kelsey v. Covert, 15 Howard's Practice, 92.
Robinson v. West, 1 Sandford, 18 (void).

Ballouhey v. Cadat, 3 Abb. N. S., 122 (void).
Coppernoll v. Ketcham, 56 Barb., 111 (void)
Bissell v. Railroad Co., 67 Barb., 385 (affirmed 67 Barb., 393).
Prussia v. Guenther, 16 Abb. N. C., 237 (void).
Hewitt v. Howell, 8 How., 347 (void or absent).
Bank v. Powers, 43 App. Div., 178 (void).
Pixley v. Winchell, 7 Cow., 366 (defect or absence.
Dix v. Palmer, 5 How., 233 (voidness or absence).
Merkee v. Rochester, 13 How., 157 (defect or absence).

(c) Cases holding that an appearance of a defendant is valid and gives the Court jurisdiction and cures defects in voidness or absence of process, whether or not defendant at the time of appearing knows of the voidness or defect or absence of process and even though he thinks himself bound to appear.

Coppernoll v. Ketcham, 56 Barb., 111.
Legate v. Lagrille, 1 How., 15.
Wright v. Jeffry, 5 Cow., 15.
Reed v. Chilson, 142 N. Y., 152.
Olcott v. McLean, 73 N. Y., 223.
Woodruff v. Austin, 16 Misc., 543.
Bissell v. Railroad, 67 Barb., 385.
Pixley v. Winchell, 7 Cow., 366.
Phelps v. Phelps, 6 Civ. Pro., 119 (affirmed 42 Hun, 642).
Sprague v. Irwin, 27 How., 51.
Mulkins v. Clark, 3 How., 27.
Hill v. Smith, 2 How., 242.

(d) Cases holding that mere endorsement of papers by an attorney without restricting his appearance or objecting to the defect constitutes a general appearance:

Phelps v. Phelps, 6 Civ. Pro., 119.
Baxter v. Arnold, 9 How., 445.
Douglas v. Haberstro, 8 Abb. N. C., 230.
Kelsey v. Covert, 15 How., 92.
Ayers v. Railroad, 48 Barb., 132.

The attorney for the defendant, Carl Schurz Petrasch, signed himself as such attorney, without restriction, to the notice of appearance and answer served upon the plaintiff, and also to numerous papers submitted by him to the Circuit Court in opposing the application to compel the filing of the answer.

As far as the present New York practice is concerned, most of the foregoing cases have been overruled by Section 421 of the Code, so far as they are in conflict with that section. It is evident from them, however, that at the time of the adoption of the Circuit Court rules for the Eastern District of New York, the mere service on plaintiff's attorney of the notice of appearance and answer constituted a general appearance in the action whether or not the summons was void or non-existent—the same rule as is now established by Section 421 of the Code.

It is also evident from these cases that there is no merit in Langer's contention that his appearance was not voluntary, being induced only by his opinion that the summons was valid. In many of these cases, it is held that an appearance so induced is voluntary and valid to give the Court jurisdiction, though in some of them where the Court so held the defendant urged that his appearance was not voluntary inasmuch as it was compulsory.

The cases most closely resembling our case are cases (a number of which are cited above) where a summons only was served in an action for the collection of a penalty, which, under the New York Statutes (Section 1897 of the Code) is required to be endorsed with a distinct reference to the statute under which the penalty is imposed, the absence of which endorsement has been held to make the summons incurably void (*Brown v. Pond*, 5 *Fed.* 31; *U. S. v. Reilly*, 88 *Fed.* 480; *Lassen v. Aron-*

son, 21 *N. Y. Supp.*, 452; *Bank v. Stringer*, 75 *App. Div.*, 127). The Stringer case and *Delisser v. Railroad*, 59 *Super. Court*, 233; and *Crown Cotton Mills v. Turner*, 82 *Fed.*, 337, hold that a defendant in such a case *could* not know until the complaint was served what the cause of action was and therefore could not know when the summons was served that the summons was void. He is bound to appear, however, upon the receipt of the summons or have judgment by default taken against him. In each of these cases for enforcement of a penalty then, plaintiff's negligent act prevented defendant from knowing the fatal defect in the summons. The appearance served in such ignorance nevertheless was held to give jurisdiction. While in *Lassen v. Aronson*, 21 *N. Y. Suppl.*, 452, and the Stringer case cited above, permission was given to withdraw the appearance on discovery of the defect, there is no case which has permitted a withdrawal after the lapse of a year and after the Statute of Limitations has run. In the Stringer case the motion to withdraw the appearance was made without delay; the summons was served October 3rd, the complaint was served November 11th, and the notice of motion to withdraw the appearance was made November 23rd, 1901. This does not appear from the reported case, but may be seen in Volume 202, Number 190, Cases & Points of the Third Department, Bar Association Library. In *Lasson v. Aronson* it was also made promptly, as shown by deponent's affidavit, subdivision 8, *U. S. v. Reilly*, *supra*, an exactly similar case to our own, refused permission to withdraw appearance on account of laches of the defendant.

But, as said before, there is before this Court no question of withdrawal of the appearance, since no such application has ever been made.

4. By opposing the Circuit Court application on the ground of plaintiff's laches in making it, the defendant submitted to the jurisdiction of the Court.

(Jones v. Anderson, 10 Wallace, 327, which is numerously cited).

In the case just cited a defendant appeared and urged, first, that the Court had no jurisdiction, second that there was no equity in the plaintiff's case. The Court held that his second plea constituted an appearance, in spite of his claim that his appearance was special only.

In *Crawford v. Foster*, 84 *Fed.*, 941, where on a motion to revive a judgment, the defendant alleged that process was defective and claimed that he had appeared specially, but also urged that the judgment sought to be revived was void on its face and incapable of enforcement by execution, it was held that by so pleading to the merits of the application, the Court acquired jurdisdiction in spite of the claim of a special appearance.

5. If defendant has appeared there is no necessity for any process at all (See cases cited in orignal brief under first point).

In *Segee v. Thomas*, 3 *Blatchford*, 11, the Court said:

> "And if he (defendant) is not served anywhere with process of any kind and appears in the suit and submits to the jurisdiction of the Court, it is the same as if he had been regularly served with process. The object of process is to get the defendant into Court to answer and defend the suit, and his appearing to answer and defend without process is as binding upon him as if he appeared in the proceeding on process regularly served. In this case the subpœna was served upon the attorney of the defendant in Connecticut. That was the only service and the defendant has by appearing and answering the bill waived all other service."

6. If the Court thinks that plaintiff is not entitled as a matter of right to the relief asked and thinks further that it has any discretion in the matter, it is submitted that this case is one in which its discretion should be exercised in favor of plaintiff.

As shown by the motion papers, the plaintiff is a very poor woman who sues to recover damages resulting from the death of her husband.

If the motion is not granted, the Statute of Limitations has run and she will be without remedy. If the motion is granted, the only hardship imposed on the defendant will be the necessity of defending this action. If plaintiff's case is a just one, defendant should compensate her for her loss. If it is not a just one, defendant may establish this on the trial and so defeat the action.

7. The United States Supreme Court will not consider any question of laches before the application was made to the Circuit Court. That question was before that Court and was decided in favor of the plaintiff, the Court saying that the only ground of its action was the fact, as claimed by Judge Thomas, that no action was pending before him.

Respectfully submitted,
RICHARD A. IRVING,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

Ex parte GERTRUDE GLASER, as Administratrix of the goods, chattels and credits of ISADOR GLASER, deceased.	No. 16 Original.

State of New York, }
County of New York, } ss.:

RICHARD A. IRVING, being duly sworn, deposes and says in answer to the affidavits of Alvin C. Cass and B. L. Benedict attached to the return herein

1. Deponent claims that said affidavits are not a part of the return and should not be considered on this motion but deponent replies to them for fear this Court may deem them a part of the return and may be misled by them.

2. That the copy of the summons in the Circuit Court action served upon Anthony P. Langer contained no reference to a seal of the clerk on the original, thereby giving said Langer and his attorney notice of irregularity in the summons. (See subdivision 5 and 6, Cass's affidavit).

3. While the complaint and summons were not "on file" with the clerk of the Circuit Court and while one of the affidavits in support of the motion in the Circuit Court mistakenly stated that they were so on file, said summons and complaint were actually in the office of the said clerk and in the possession of said clerk (having been delivered to him

by the Marshal) from the time of the service by the Marshal on the 30th of December, 1902, up to the time when the mistake was discovered, a year afterward. Joseph C. Cochran, the deputy clerk, so testified in the deposition from which an extract is quoted by Cass (subdivision 16, Cass's affidavit) and it is otherwise undisputed. The only reason they were not filed was because the clerk refused to file them. They were evidently submitted for filing by the Marshal and also later by deponent.

4. Petitioner takes the position on this motion that it is immaterial whether the defect in the summons was known to the defendant Langer before he appeared or not, but since in the seventh subdivision of his affidavit, Cass has attempted to show that it was not known before said service, deponent submits the following to show that said Cass is probably mistaken:

(a) The deputy clerk Cochran in his deposition quoted by Cass states that the summons was given to him on the 29th day of December (it was actually the 30th, as shown by the Marshal's return and Cass's affidavit, subdivision 17, making the return day twenty days later, January 19th, 1903). He then says that shortly after, he took up the papers to enter them in the register and discovered the defect. That he then called up a telephone number which happened to be on the back of this complaint, but which was not the telephone number of Mr. Carr, the only attorney of record for the plaintiff, and informed of the defect someone who answered the telephone and who said he represented Mr. Carr. These are his exact words:

> "I might say I called up according to my recollection, the person whose name was on

the papers and scratched out on the cover attached to the summons and complaint because I do not think Mr. Carr's name was in the telephone book. I am not very certain. The person who answered the 'phone said he would look up the matter or words to that effect."

While his deposition does not state the date when he called up this person said Cochran afterwards stated to deponent that to the best of his (said Cochran's) recollection, the said telephone conversation occurred on the day the summons and complaint was given him by the Marshal (December 30th,) but that he would swear positively that it was within less than a week of the time of the delivery by the Marshal of the said summons and complaint to the clerk. In the aforesaid deposition, in answer to the question of Mr. Cass: "Do you remember my bringing the notice of appearance and answer to your office to be filed or do you remember that such papers were brought in this case?" he says, "To the best of my recollection some one did present these papers for filing; I do not know just who the person was—*about a week later.*" He also stated to deponent, though it did not appear on the deposition, that he did not recollect whether the papers offered him for filing consisted of both a notice of appearance and answer but that it might have been only a notice of appearance or a notice of appearance and answer or an answer only. All he recollected was that some paper or papers were offered him for filing.

By this evidence, which is undisputed, it would appear that the answer or notice of appearance of defendant was offered for filing and the defect discovered by defendant about two weeks after the summons was served. This would correspond very closely with the date of the notice of appearance,

which is admitted to have been served by defendant and which is dated January 14th, 1903, two weeks and a day after the complaint was served.

(b). Deponent also thinks that said Cass is mistaken for the reason that, as shown by the extract from deponent's former affidavit quoted in subdivision 17 of Cass's affidavit, said Cass stated to deponent not earlier than 4:30 in the afternoon of the twentieth day after the service of the complaint (being the last day to answer) that he *could* not serve his answer that day. It also appears from said affidavit of deponent that the clerk's office of the said Circuit Court closes at 5 P. M. Said Cass swears in the affidavit verified by him on the 4th of April, 1904, and used on the said motion:

> "To the best of my recollection, I took the answer with the notice of appearance for filing to the clerk's office on the day on which the answer was served. I am unable to recall the date, but do remember the particulars of the service of the answer for these reasons: I personally attempted to obtain an extension of time to plead and to that end saw Richard A. Irving, one of the plaintiff's present counsel * * * I remember making special efforts and obtaining the defendant to come to come to New York and having the answer served within the time without returning to said Irving for an extension."

Said Cass also swears in said affidavit that he is sure said service was made *before* the expiration of said twenty days.

Deponent in said former affidavit submitted to the Circuit Court swears that the residence of the defendant in Williamsburgh was at least thirty minutes from the office at that time of his attorney.

The office of defendant's attorney was at least twenty minutes from the said Circuit Court Clerk's office. The postmark on the envelope in which the answer was served on the twentieth day was stated on said motion to have been lost, but deponent swore that to the best of deponent's recollection, the postmark showed that the mailing was about the hour of ten o'clock in the evening of January 19th, 1903. The answer itself shows that it was sworn to on the day on which it was served, January 19th, 1903.

From the foregoing, it appears that at 4:30 in the afternoon of January 19th, 1902, the defendant's answer was presumably not ready to be served, since his attorney stated that he *could not* serve it on that day; that immediately thereafter he communicated with his client in Williamsburgh and made him come to New York, which at best (supposing his client to have been reached at once by telephone) could not have been done in less than thirty minutes. The clerk's office closed at five o'clock and it would have taken twenty minutes for the attorney to have reached the said clerk's office after having his answer prepared and signed by his client, making it impossible under the most favorable circumstances for said Cass to have tendered said answer to the clerk for filing *after* the service of said answer. In other words, it is undisputed that the answer was served after 4:30 on the last day to serve it. On the other undisputed facts as to time and distance it would have been impossible for said Cass to have gotten to said clerk's office on said day *after* the service of his answer. Said Cass is positive that these papers were tendered for filing before the expiration of the twenty days and such proffer to the clerk and discovery of defect must therefore have been before the answer was served on the plaintiff's attorney.

The office of the attorney for the defendant then represented two Casualty Insurance Companies and had and now has a large number of actions similar to this and it is natural that said Cass might be mistaken in his recollection.

5. Petitioner does not mean to contend (as Cass intimates in Subdivision 14) that in the State Courts of Record the summons is signed by the clerk, but in the said Courts, while the summons is to be signed by the attorney of Record, it is not necessarily signed by the attorney himself but may be signed by anyone for him and is often simply printed, including the attorney's name.

6. The office of the attorneys for the plaintiff in the Circuit Court action were never advised of the defect in the summons by the clerk or anyone until after the Statute of Limitations had run. This was positively sworn to on the application in the Circuit Court, and the only suggestion to the contrary was the deposition of the deputy clerk who stated that he telephoned somebody. Affidavits were submitted on the motion from everybody connected with the office of plaintiff's attorney of record and with the office of her counsel and also from her attorney and counsel themselves denying that such telephone message had ever been received and denying knowledge of the defect until after the Statute of Limitations had run. The reason the said last mentioned affidavits as to this telephone conversation were made *ex parte* (as claimed in Cass's affidavit, the last of subdivision 16) is that after the statements of the clerk established by these affidavits were made to deponent, deponent requested the attorney for the defendant to reopen the deposition for the purpose of having Cochran's further testimony taken direct, which was refused by defendant's attorney. Said Cochran also re-

fused to make said affidavits personally unless the attorney for defendant would consent, which the attorney for defendant refused to consent to.

It was established on said Circuit Court motion by deponent's affidavit (which was not denied), that defendant gave to the employe who made the mistake, as to the summons the sum of $5.50 for the payment of any fees of the clerk or Marshal, which sum was shown by deponent's check book, and that deponent had no recollection of how much of said sum was returned.

7. The form of summons used in the United States Circuit Court for the Southern District of New York, and in the Courts of Record of the State of New York leaving out the formal parts is as follows:

"To the above named Defendant:

"You are hereby summoned to answer the "complaint in this action and to serve a copy "of your answer on the plaintiff's attorney "within twenty days after the service of this "summons, exclusive of the day of service, and "in case of your failure to appear or answer, "judgment will be taken against you by de- "fault for the relief demanded in the com- "plaint."

This is followed in the United States Courts by the usual attestation in the name of the Chief Justice and the signature of the clerk, which signature is usually not actually made by the clerk, by but the deputy. Deponent at the time of said application in the Circuit Court tried in vain to find the rules of the Circuit Court for the Eastern District of New York and was told by the clerk that the same were not printed except an edition printed about 1865, which deponent was unable to find anywhere, and when deponent requested that he be shown the rules unprinted, he was told that it was too much trouble to the deputy clerk to get them

for him and hence deponent was unable to get them. He was also told by the deputy clerk that these rules were the same as the rules for the Southern District of New York, which Southern District rules contain no requirement for the filing of an answer or notice of appearance.

Deponent, on the 24th day of April, 1905, called again at the office of the Clerk of the Circuit Court of the Eastern District of New York, and again asked about said rules. That after some time said clerk showed to deponent an old typewritten copy of the rules of said Court, stating to deponent that said rules were adopted at the organization of the Court in 1865, and had not since been altered except in one or two respects, which did not effect this motion. That rule 70, as shown in said set of rules is as follows:

> "The following pleadings may be used in all civil actions at law in this Court, namely: the declaration, plea, demurrer and replication, and the provisions made applicable to such or corresponding pleadings by the Revised Statutes of this State so far as the same are not inconsistent with the laws of the United States are adopted as rules applicable to the above mentioned pleadings in the above Court."

Rule 2 says:

> "All notices shall be in writing and shall be served on the attorney in the case."

No claim whatever was made in the application before the Circuit Court that the rules of that Court required filing of a paper. These rules were not alluded to or considered in any way.

8. That counsel for defendant cited on the application to the Circuit Court the case of *Lassen v. Aronson*, 21 *New York Supplement*, 452, as authority for the position that a notice of appearance might be withdrawn if put in under mistake, no matter when the application to withdraw was made. It did not appear in the report of this case when

the application to withdraw was made, but deponent thereupon consulted with the attorney for the plaintiff in said case of Lassen v. Aronson, and said attorney submitted to the Circuit Court an affidavit that the motion to withdraw the notice of appearance was served eight days after the complaint was served and only forty days after the summons was served. The application to withdraw could not have been made until this complaint was served.

9. That Section 421 of the New York Code of Civil Procedure was not contained in the laws of New York until about 1881, but that at the time the aforesaid rules of the Circuit Court were adopted the only statute law on the subject was contained in Section 139 of the old Code: "The voluntary appearance of a defendant is equivalent to personal service of the summons upon him," and up to the adoption of the said Section 421 specifically prescribing the way in which an appearance shall be made the Courts of New York universally held that an appearance might be made by merely subscribing the name of the attorney to papers in the action and not specifying that the appearance was made specially.

10. That deponent, after the finding of the mistake in the summons, proferred the said summons and complaint and said notice of appearance, served on deponent to the clerk of said Court for filing, but said clerk refused to file said papers and repeatedly stated to deponent that he would file no papers in this action, which attitude of the clerk was known to Honorable Edward B. Thomas on the said application in this Court.

RICHARD A. IRVING.

Sworn to before me this
27th day of April, 1905.

WILLIAM C. REDDY,
Notary Public,
N. Y. Co.

FILE COPY

No. 16 Original,
October Term 1904.

Supreme Court of the United States.

Office Supreme Court
FILED
APR 20 19
JAMES H. McKENNEY

IN THE MATTER

OF

THE PETITION OF GERTRUDE GLASER, AS ADMINISTRATRIX, FOR A WRIT OF MANDAMUS TO THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Respondent.

RESPONDENT'S ANSWER.

CARL SCHURZ PETRASCH,
Attorney for Defendant in the Court below.

ALVIN CUSHING CASS,
Of Counsel for Respondent and for Defendant in the Court below.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

IN THE MATTER

OF

The Petition of GERTRUDE GLASER, as Administratrix, praying for a writ of mandamus to the Judges of the United States Circuit Court for the Eastern District of New York.

The Honorable Edward B. Thomas, United States Judge, acting Judge of the Circuit Court of the United States for the Eastern District of New York, before whom all the proceedings referred to in the petition were had and by whom the decision therein was made, and who is now presiding as trial Justice in the United States Circuit Court for the Eastern District of New York, and upon whom the rule of this Court was served, answering the petition of Gertrude Glaser, that the Judges of such Circuit Court show cause why a writ of mandamus should not be granted commanding them to take jurisdiction and proceed against Anthony P. Langer in the suit now claimed by petitioner to be pending and undetermined in said Circuit Court, wherein Gertrude Glaser, as administratrix, the petitioner, is plaintiff, and said Anthony P. Langer, defendant, and to strike from the records of this Court the order made on the 14th day of November, 1904, and entitled "In the Matter of the Application of Gertrude Glaser, Administratrix, to Compel

the filing of an Answer or other relief, and to make such disposition of said suit as ought to have been made had said order not been made and entered therein, and why the petitioner should not have such other relief as might be just," respectfully submits his action in the premises and certifies that his reasons for denying the motion referred to in the petition are set forth in the order made thereon and which reads as follows:

At a Term of the United States Circuit Court for the Eastern District of New York, held at the Post Office Building, in the City of Brooklyn and County of Kings, on the 14th day of November, 1904.

Present—Hon. EDWARD B. THOMAS, *Justice*.

IN THE MATTER

OF

The Application of GERTRUDE GLASER, as Administratrix, &c., to compel the filing of an answer or other relief in an action alleged to be pending between Gertrude Glaser, as Administratrix, &c., of Isadore Glaser, deceased, plaintiff, and Anthony P. Langer, defendant.

A motion having been made herein for an order compelling the said Anthony P. Langer to file his answer in an alleged action against Gertrude Glaser, as administratrix, &c., of Isadore Glaser, deceased, plaintiff, and Anthony P. Langer, defendant, and for such other or further relief as might be proper, and said motion having duly come on to be heard; now on reading and filing the notice of

motion dated March 5, 1904, and the affidavit of Alfred H. Holbrook thereto attached, verified March 5, 1904, and the affidavit of Harvey C. Price, verified April 18, 1904, and the affidavit of Richard A. Irving, verified the 18th day of April, 1904, and the affidavit of Alfred H. Holbrook, verified the 18th day of April, 1904, and the affidavit of Lewis E. Carr, Jr., verified the 18th day of April, 1904, and the affidavit of Richard A. Irving, verified the 3d day of June, 1904, and the affidavit of Charles H. Blain, verified the 2d day of June, 1904, and the affidavit of Lewis E. Carr, Jr., verified the 29th day of June, 1904, and the affidavit of Richard A. Irving, verified the 29th day of June, 1904, and the affidavit of Olivia Moussetts, verified the 29th day of June, 1904, and the affidavit of Harvey C. Price, verified the 29th day of June, 1904, and the affidavit of Richard A. Irving, verified the 6th day of July, 1904, and the summons therein, dated September 29, 1902, and the complaint therein, verified the 22d day of April, 1902, and the notice of appearance of defendant, dated January 14, 1903, and the answer of defendant, duly verified by him on the 19th day of January, 1903, and the plaintiff's notice of trial, dated January 29, 1904, and the admission of defendant's attorney of service of same stamped thereon, and the affidavit of Gertrude Glaser, verified the 28th day of October, 1904, and of Richard A. Irving, verified the 29th day of October, 1904, duly permitted by this Court to be filed *nunc pro tunc*, in support of said motion; and the three affidavits of Alvin C. Cass, verified March 11, 1904, and April 4, 1904, and June 9, 1904, respectively, and the affidavit of Theodore P. Nanz, verified April 19, 1904, in opposition thereto, and after reading and filing the stipulations of counsel dated March 3, 1904, April 15, 1904, April 27, 1904, May 3, 1904, May 17, 1904, and two dated June 25, 1904, and undated stipulation extending time to April 15, 1904, and stipulation dated April 20, 1904, and the deposition of James G. Cochran, taken the 25th day of June, 1904, together with the letter of the Court, dated June 7, 1904, and after hearing

Alfred H. Holbrook, Esq., of counsel for plaintiff, in support of said motion, and Alvin C. Cass, Esq., of counsel for defendant, in opposition thereto;

Now, after due deliberation being had, it is

Ordered, that the said motion be and the same hereby is, in all things denied, upon the sole ground that no action of Gertrude Glaser, as administratrix of the goods, chattels and credits of Isador Glaser, deceased, plaintiff, against Anthony P. Langer, defendant, is nor ever has been pending in this Court.

Enter.

EDWARD B. THOMAS,
United States Circuit Judge.

That all of the affidavits and papers before him on the decision of that motion have been forwarded to the Clerk of the United States Supreme Court, for such use and consideration as the Honorable Judges of said Court may deem advisable.

And the said Judge of the United States Circuit Court for the Eastern District of New York, hereby appoints Alvin Cushing Cass counsel for the defendant Anthony P. Langer, to represent him and the Judges of the United States Circuit Court of the Eastern District of New York, and to present to the Honorable the Supreme Court of the United States such facts and considerations in connection with said petition as he may be advised.

Dated April 18, 1905.

Edward B. Thomas

Judge United States Circuit Court of
the Eastern District of New York.

Supreme Court of the United States.

Ex parte GERTRUDE GLASER, as Administratrix of the goods, chattels and credits of Isadore Glaser, deceased, Petitioner.	October Term, 1904. No. 16, original.

STATE OF NEW YORK, }
County of New York, } ss.:

ALVIN C. CASS, being duly sworn, deposes and says:

1. I am an attorney and counsellor at law and on behalf of the defendant, Anthony P. Langer, had personal charge of the defense of the alleged action brought in the Circuit Court of the United States for the Eastern District of New York, by Gertrude Glaser, as administratrix of the goods, chattels and credits of Isadore Glaser against said Anthony P. Glaser, which is the action the petitioner refers to in her petition.

2. As such I caused the notice of appearance and answer, referred to in the petition, to be served upon Lewis E. Carr, Jr., the attorney of record for the plaintiff therein, and I opposed the application made by and on behalf of said Gertrude Glaser to compel the filing of the defendant's answer.

3. The said Anthony P. Langer is, as deponent believes, the real party in interest in this proceeding other than the petitioner, Gertrude Glaser. The petition relates to an alleged action brought to recover damages for the negligent killing of the plaintiff's intestate through the negligence of Anthony P.

Langer, therein named as defendant. Such action was brought to recover money damages against said Anthony P. Langer, and for no other relief, under a statute of the State of New Jersey, permitting an action to be brought by or on behalf of the next of kin to recover damages sustained by them through the death of their intestate, through the negligence of some person or persons.

4. I have read the petition of Gertrude Glaser herein, and the same fails to state all the facts in the matters therein referred to, material to the interests of Anthony P. Langer, and the facts as stated in the petition seem to deponent in several particulars, to be ambiguous, or not strictly in accord with your deponent's recollection. The facts as involved in the proceedings referred to in the petition herein, are as follows:

On July 22, 1901, Isadore Glaser, the husband of the petitioner herein, met accidental death through the alleged negligence of the employees of Anthony P. Langer, which claim of negligence Anthony P. Langer does now and always has vigorously contested.

Nine days thereafter, and on August 1, 1901, letters of administration were issued to Gertrude Glaser, thereby qualifying her to bring action against the said Anthony P. Langer.

Nothing was done by said Gertrude Glaser, except the obtaining of ancillary letters of administration within the State of New York, until the 29th day of December, 1902, when what purported to be a summons was issued. The Statute of Limitations, within which an action to recover damages for death may be brought is two years in the States of New Jersey and New York. Gertrude Glaser had, therefore, out of a period of two years within which she might bring an action, waited more than a year and four months after she had qualified as administratrix before instituting suit.

5. On December 29, 1902, as shown by the petition herein, the petitioner's attorney prepared a summons and a copy thereof was served upon the defendant in that action, Anthony P. Langer, by an officer of the United States Circuit Court, *i. e.*, a United States Marshal.

The summons was not issued out of the United States Court; it was not signed by the Clerk, the seal of the Court was not attached, no application for the issuance of the summons as required by the practice in such Court was made, the complaint was not filed, no fee was paid for the issuance of the summons, or for the filing of the summons and complaint. The service upon Anthony P. Langer, however, was regular and proper, except that the summons was void by reason of the foregoing facts and none of those facts appeared in the copy of the summons served upon the said Langer.

Langer was a carpenter engaged in his business at the time referred to in the papers in the Village of Edgewater, State of New Jersey. He was not familiar with the signature of the Clerk of the Court, nor indeed with the forms or essentials of process issued out of said Court. He was informed at the time of service that such process server was a United States marshal, and he believed that the service was regular and proper, and the copy of the papers so served was taken by him to his attorney, and in a few days came into the possession of the associate of such attorney, your deponent, for action thereon.

Such copy of the summons purported to be a copy of a proper summons and was regular on its face.

6. Your deponent believed that the original summons was regular in all respects; he had no knowledge whatsoever of any irregularity or defect therein, and the original summons and complaint were not, at the time the notice of appearance and answer hereinafter referred to were served by deponent,

on file with the Clerk of the United State Circuit Court.

7. Solely in reliance upon the supposed validity of the summons served upon the defendant in that action, your deponent caused to be prepared and served upon the attorney for the petitioner herein, Gertrude Glaser, the plaintiff in that action, a notice of appearance and verified answer. A correct copy of that notice of appearance is printed in the petition.

The petition, at page 6, refers to a claim made by petitioner in the Circuit Court that counsel for the defendant (referring to deponent) must have known of the defect in the summons *before* serving said answer.

Your deponent specifically denies that he had any such knowledge or any information which might put him on guard as to any defect in the original summons until after the service of the answer.

In an affidavit verified by your deponent in June, 1904, and now with the rest of the papers in this matter in the office of the Clerk of the United States Circuit Court for the Eastern District of New York, your deponent swore as follows:

> "The notice of appearance and answer were served under my instructions, and at the time of such service and thereafter, and until I attempted to file the notice of appearance and answer together, I was in entire ignorance of the fact of the impropriety in the summons. Those papers would not have been served had I not been misled by the service upon the defendant."

8. Your deponent further says that upon the service of such answer upon the attorney for the plaintiff in tnat action, he went to the office of the Clerk of the United States Circuit Court for the Eastern District of New York with such notice of appearance and answer, for the purpose of filing them as required by the rules of that Court.

That upon presenting the notice of appearance and answer to the Clerk, he was informed by him that no summons in such an action had been issued by the Clerk. That no index had been made in the records of that Court, of any such action, but that deponent could leave the notice of appearance and answer if he desired.

The Clerk further advised your deponent that the signature on the original summons purporting to be the signature of the Clerk, was not, in fact, the signature of the Clerk, nor had such summons been signed or issued through him.

Your deponent thereupon asked the Clerk what the effect would be of your deponent's failing or refusing to file the notice of appearance and answer, and he was informed that there being no action properly commenced, it would be necessary for the plaintiff to re-serve the defendant with original process.

Your deponent thereupon advised the Clerk that he did not want to file such notice of appearance and answer and did not want in any way to waive the impropriety in the summons, and he declined to file such notice of appearance and answer and has from that day to this, so refused and declined, and contested the attempt on the part of said Gertrude Glaser, petitioner herein, to compel their filing.

9. Your deponent contests the correctness of the law as given in the petition herein, that the notice of appearance and answer so served through him on behalf of Anthony P. Langer constituted an appearance in the action.

Your deponent contests that such service was a voluntary appearance under the decisions of the United States courts or the decisions of the courts of the State of New York, and your deponent claims and has claimed that such appearance could only be effective by the *filing* of such notice of appearance and answer or one of them.

10. Your deponent urges that the service of the notice of appearance and answer having been made under a mistake of fact, and having been induced by the wrong of the petitioner, *i. e.*, the forgery (unintentional as it may have been) of the signature of the Clerk, such service is not under any authority, a *voluntary* appearance.

11. Deponent further claims that there was no necessity for an application by him to withdraw the notice of appearance and answer served upon the petitioner's attorney, for the reason that such appearance (though induced by mistake) had not been completed.

Deponent cites as authority for this proposition the efforts made by petitioner to compel the filing of the notice of appearance or answer, because the filing of one was necessary to give the Court jurisdiction to proceed with the plaintiff's claim for judgment. Your deponent further urges that the provisions of the New York Code of Civil Procedure relative to the service of notice of appearance or answer are inapplicable, as the State court practice does not require the filing of pleadings to render service effective, and the practice governing the Circuit Court of the Eastern District is shown by the affidavit of the Clerk of the Court hereto annexed.

The notice of appearance was served three days before the answer simply because deponent endeavored to obtain an extension of time to answer. On failure to obtain the extension the answer was prepared and served.

12. The answer was served on January 19, 1903. Plaintiff made no attempt to prosecute the action until January 29, 1904, more than a year later and until over two years and five months had elapsed since plaintiff qualified as administratrix. Then a notice of trial was served. This could be returned *only* because of a defect in the service or some irreg-

ularity in the notice, and neither was present. There was no authority for returning it on the ground that the summons was defective.

13. In March, 1904, the petitioner served a notice of motion to compel the filing of defendant's answer, and it is the order denying that motion which petitioner seeks on this application to review.

On behalf of the defendant your deponent opposed that application on the following grounds:

(*a.*) The summons served was a nullity.

(*b.*) The service of the notice of appearance and answer was caused by the wrong or mistake of the plaintiff, and was not therefore a voluntary appearance.

(*c.*) That no appearance had been made in the action, as neither the notice of appearance or answer had been filed as required, and that therefore no motion for leave to withdraw his appearance was necessary on the part of the defendant.

(*d.*) That the plaintiff's remedy was wrong. If an appearance had been made, then plaintiff should have asked for judgment on default.

(*e.*) The plaintiff was guilty of gross laches.

14. Your deponent desires to dispute the contention raised by the petitioner that the mistake in the summons was due solely because a clerk in the employ of petitioner's attorney "thought this" (the writing in of the clerk's name himself) "the proper procedure (*confusing the practice of the Federal and State courts*)" (pp. 3 to 4 of the Petition).

The name of the Clerk of the Court does not appear on the summons of any court of record of the State courts of the State of New York, neither Supreme Court, City Court of the City of New York, County Court or otherwise.

The name of the Clerk of the Court, however, appears on the summons issued in the Municipal Court of the City of New York, of which there are twenty-three in said City. In those courts the summons is issued by the Clerk, is signed by him and the filling in of the Clerk's name would constitute in such Municipal Court the same grave error as was committed in this case. Therefore, the clerk could not have confused the State court and the United States court's practice. Had he been thinking of the practice of the State courts, he could not have made the mistake he did.

15. That petitioner's attorney knew or should have known of the defect in the summons appears from the following facts:

(*a.*) No application for the summons was made as required by the Circuit Court for the Eastern District of New York.

(*b.*) The form of summons issued by the Clerk of the Circuit Court for the Eastern District of New York requires the filing of the defendant's answer.

(*c.*) His office was advised by the deputy clerk immediately upon the marshal's return of the summons that it was irregular, as more fully appears below.

(*d.*) Plaintiff's counsel, Richard A. Irving, expecting a default in the service of defendant's answer, and taking precautions to reap advantage from that anticipated default, was watching to see if the answer was served and filed in time, as more fully appears below.

(*e.*) No fee was paid by plaintiff for the filing either of the summons or complaint or for the issuance of the summons.

16. The facts referred to in paragraph 15, subdivision (*c*), regarding the information given by the Deputy Clerk to the office of plaintiff's attorney are as follows:

The Deputy Clerk of the Court, Joseph G. Cochran, by deposition now in the Clerk's office, with the papers in this matter, testified as follows:

> "Q. State whether you noticed anything
> "unusual about those papers, and, if so, what?
> "A. I took the papers in hand to enter them
> "up in the register, and was unable to find
> "in the register any record of such a case. I
> "then looked at the summons and complaint
> "more carefully and discovered that the sum-
> "mons was not signed by Mr. Benedict, the
> "Clerk, nor did it bear any seal of the Court.
> "Q. Was it or was it not a usual thing to find
> "such a void summons in this Court? A. It
> "is very unusual. It has occurred possible
> "two or three times since I have been here.
> "This fact is one that helps me to remember.
> "The facts of the case are very clear in my
> "mind. Q. State what you did when
> "you discovered this? A. I did what is
> "customary for me to do in these cases; I
> "communicated with the attorney's office
> "whose name appears on the papers, Lewis
> "E. Carr, Jr. In this case my recollection is
> "that I communicated by telephone explain-
> "ing to the person who answered the 'phone
> "that this summons and complaint was in my
> "possession, and that I had been unable to
> "find a record of such a case in this Court,
> "and asked him to look up the matter and let
> "me know what he found."

He further testified that the summons and complaint had never been filed in his office.

This deposition was taken at the suggestion of Mr. Justice Thomas, made in a letter to the attorneys for both parties, dated June 7, 1904, as follows:

> "DEAR SIR:
> Mr. Holbrook (one of the attorneys for the plaintiff, and a partner of Richard A. Irving)

in his affidavit on the motion in the above action, states as follows:

"That on the day of February, "1904, deponent went to the office of the "Clerk of this Court to file his note of issue "and was then informed for the first time "of the alleged defect in the service of the "summons and complaint herein. That "deponent was then handed by said Clerk "the original summons and complaint with "the Marshal's certificate, the same being "submitted herewith as part of the motion "papers. That said Clerk stated that this "had been on file in his office since about "the 30th day of December, 1902, &c."

Mr. Irving and Mr. Carr likewise disclaim knowledge of the illegal service. The summons and complaint bear no evidence of having been filed, and the Deputy Clerk states that they were not filed, and he also states that he recollects advising the plaintiff's attorneys' office by telephone of the condition of the matter at the time the Marshal returned the summons and complaint. It seems proper that the evidence of the facts, whatever they may be, should be taken and made a part of the motion papers,

Yours truly,
EDWARD B. THOMAS,
U. S. J."

Deponent feels it only fair to the petitioner's attorney to state that subsequent to this deposition of the Clerk, the attorneys for the petitioner produced *ex parte* affidavits by themselves, their clerk and their telephone operator denying positively that any such message had ever been received.

17. The facts referred to in paragraph 15, subdivision (*d*), regarding the attention of plaintiff's attorney Irving having his attention directed at the time to the service and filing of the answer, are as follows:

On the argument of the motion made by him to compel the filing of the defendant's answer, said at-

torney urged that the defendant's answer was not served in time to enable the defendant thereafter to file it in the office of the Clerk before it closed for the day. The summons was served on December 30, 1902, and January 19th was the last day for appearance and answer. In an affidavit made by said Irving, verified April 18, 1904, and now with the rest of the papers in this matter in the office of the Circuit Court Clerk, he swore as follows:

> " That late in the afternoon of the last day " and not earlier than half past four o'clock " P. M. said Cass (meaning your deponent) " spoke to deponent on the common tele- " phone of said Carr and deponent, and " stated that he wanted an extension to an- " swer in this suit; that he had vainly en- " deavored to see said Carr and had made " numerous trips to his office to find him, and " asked if deponent as an associate of said " Carr could not give to the attorney for the " defendant an extension of time within " which to serve his answer; that he would " be unable to get his answer served that day " and that he wanted deponent to give him " only sufficient time to see said Carr on the " next day, if deponent would do no more. " * * * That deponent expected that said " defendant would be in default for the reason " that *it was then too late to procure an ex-* " *tension from the Court*, and deponent knew " that defendant who lived in the part of " Brooklyn known as Williamsburg, was " often away and inaccessible and lived at a " distance from his attorney's office. That " deponent waited at his office until six thirty " o'clock, and until the last delivery of mail " on that day, and watched for any papers or " mail delivered for said Carr, but that no " no answer was served at the office of said " Carr by the defendant until after deponent " left the office on that day. * * * *That* " *the Clerk's office of this Court closes daily* " *at 5* P. M."

18. Your deponent contests the correctness of the contention made by the petitioner that Anthony P.

Langer entitled the plaintiff to the relief sought, by opposing her application, and your deponent contends that the proposition of law sought to be enforced by the petitioner that the only way said Langer could avoid waiving the defect in the summons was to allow the motion to compel him to file his answer to be granted by default, is unsound.

19. This affidavit and return is verified by your deponent, and not by Anthony P. Langer, for the reason that each and all of the facts herein stated refer to transactions had by your deponent without participation by the said Langer, and that no facts stated herein are within the knowledge of said Langer, other than the service of the summons and complaint upon him, which facts are conceded as alleged in the petition. That it has been impossible to print all of the papers submitted to the Circuit Court Justice on the motion of the petitioner, within the time limited.

20. The granting of the application would be a great hardship to the defendant Langer. The witnesses to the accident were workingmen, and they have dispersed or disappeared, and the defendant will be practically unable to defend an accident case over four years and a half after the occurrence of the accident.

Sworn to before me
April 15, 1905. } Alex. Klein

Conrad Kremp.
Notary Public, No 75
L.S. Nyc.

SUPREME COURT OF THE UNITED STATES.

Ex parte GERTRUDE GLASER, as Administratrix, &c., Petitioner.	October Term, 1904. No. 16, original.

STATE OF NEW YORK, County of Kings, } ss.:

B. L. BENEDICT, being duly sworn, says:

I.—I am the Clerk of the Circuit Court of the United States, and have been since 1874.

II.—The rules and practice of this Court require and have, ever since I have been Clerk, required that the complaint and answer or other appearance in a common law action should be filed in the office of the Clerk of the Court, and such rules and practice have been strictly complied with to my knowledge for the past thirty years.

III.—Among the printed and published rules of the Circuit Court of the United States for the Eastern District of New York are the following:

> Rule 5. "All process must be signed and "sealed by the Clerk" * * *
>
> Rule 8. "Upon the service of such moni- "tion or summons, the defendant may en- "dorse his appearance thereon, or, if he re- "fuse so to do, the marshal or officer serving "the same may leave a copy thereof with "him, and thereupon return the same per- "sonally served; and in either case the clerk, "upon filing such process, shall enter the "defendant's appearance in the action, "* * * and thereupon, upon filing the

"declaration, or, if the same has been already
"filed, an order may be entered requiring
"the defendant to plead thereto within
"twenty days or that his default be entered."

Rule 35. "In order to amend, a copy of the
"amended pleading shall be filed, and an
"order to amend entered by the clerk, and
"the notice to plead or answer shall be from
"the day of the service of a copy of the plead-
"ing as amended and on file."

Rule 66. "Judgments by default may be
"entered immediately after such default is
"entered, in vacation as well as in term."

IV.—The printed form of application for the issuance of a summons issued by the Circuit Court reads as follows:

"Please to enter appearance
"as attorney for the plaintiff in
"the above entitled cause, and issue sum-
"mons to the Marshal for service upon the
"defendant above named.

".....,
"Attorney for Plaintiff.

"Dated , 190 .

"To the Clerk of the Circuit Court of the
"United States for the Eastern District
"of New York."

V.—The printed form of summons issued by the Circuit Court reads as follows:

" UNITED STATES CIRCUIT COURT

" FOR THE EASTERN DISTRICT OF NEW YORK.

" AGAINST

" TO THE ABOVE NAMED DEFENDANT:

" You are hereby summoned to answer the " complaint in this action, and to file your " answer and serve a copy thereof on the " plaintiff attorney within twenty days " * * * ."

VI.—No process has ever been issued by the Circuit Court on behalf of Gertrude Glaser and no pleading or other paper in any such suit has ever been marked filed in the office of the Clerk.

Sworn to before me
April 15, 1905.

B. Lincoln Benedict

Percy P. B. Gilkes

L.S. Notary Public Kings Co. N.Y.

FILE COPY.

FILED
APR 27 190
JAMES H. McKENNEY,
C

No. 16 Original.

Supreme Court of the United States.

IN THE MATTER

OF

THE PETITION OF GERTRUDE GLASER, AS ADMINISTRATRIX, FOR A WRIT OF MANDAMUS TO THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF.

ALVIN CUSHING CASS,
Counsel for Respondent.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

IN THE MATTER

OF

The Petition of GERTRUDE GLASER, as Administratrix, praying for a writ of mandamus to the Judges of the United States Circuit Court for the Eastern District of New York.

RESPONDENT'S BRIEF.

As indicated in the respondent's answer, he urges the following grounds in opposition to this application:

1. The summons as served, was neither issued, signed, nor sealed by the Clerk, and it was void.

2. The copy served upon the defendant, purporting to be in all respects a copy of a proper summons and served by a United Stated Marshal, the defendant, a carpenter, was not negligent in having been deceived by the forgery (unintentional as it may have been) of the name of the Clerk.

And it is urged here that the decision of Mr. Justice Thomas necessarily embodies a finding of fact

that the defendant was not at fault in having been deceived, and that this Court cannot or should not review such determinations.

3. That the notice of appearance and answer of the defendant were served without knowledge of the defect in the summons. That steps taken by the defendant while deceived by the wrong of the plaintiff, did not constitute a *voluntary* appearance.

Counsel urges that for any step in any action to be voluntary under the laws of the United States or the State of New York, a party must proceed with knowledge of the situation either actual or constructive.

It is contended here that the decision of Mr. Justice Thomas in the court below necessarily found as a determination of fact, that the service of these papers was made by the defendant in ignorance of the situation and without any negligent failure on his part to learn the facts.

It is further urged that even if the Court considers this point to be disputed and not determined in the record, still the petitioner is not entitled to a peremptory writ of mandamus if there was sufficient evidence before the Judge upon which the ruling sought to be reversed, might rest.

4. That the State Court practice does not control by virtue of Section 914 of the United States Revised Statutes or otherwise.

5. That under the rules of the Circuit Court for the Eastern District of New York, as well as under the practice of that Court for the past thirty years, it has been the universal requirement that an answer or other appearance to be effective, must be filed. That, therefore, the defendant did not by the service of the notice of appearance or answer, appear in the action, and there was no necessity for an application by him for leave to withdraw an ineffective step toward appearance.

6. That the defendant, learning of the vital defect in the summons when he attempted to file his notice of appearance and answer in accordance with the rule of the Court, and thereupon asking the Clerk of the Court what the effect of his failure to file his appearance would be, and being advised by the Clerk of the Court that it would necessitate the recommencement of suit by the plaintiff and the defendant refusing to file such papers or to take any step in the action, has not since the service of the notice of appearance and answer, appeared in the action. The respondent urges that the service of the notice of appearance and answer having been caused by the wrong of the plaintiff and having learned of the trouble before completing the appearance and thereupon refusing to complete such appearance, cannot be held to have appeared in the action unless the plaintiff can show that after service of the notice of appearance and answer the defendant took some affirmative act inconsistent with a desire to contest the validity of the summons; that an appearance in an action cannot be shown by proof of laches or the failure of a party to take any steps in an action. By this we mean that failure to return a paper served, such as the plaintiff's notice of trial, or failure to advise the plaintiff of her mistake, is not sufficient to constitute a verbal appearance, which can only be made by an affirmative step inconsistent with any other theory.

Nothing that the defendant has done since the service of the notice of appearance or answer was sufficient to constitute an appearance.

The defendant did not return the notice of trial served by the plaintiff, because the service was made in the manner regulated by law, and the notice of trial was in proper form. It could be returned only on one of these grounds. In any event, to hold that there was an appearance by reason of a notice of trial, plaintiff would have to show that the *defendant*

served a notice of trial. There would then be an affirmative act of the defendant inconsistent with the attitude actually assumed and maintained by him. The defendant was under less duty to apprise the plaintiff of her mistake, than the plaintiff to learn of it and correct it herself. In fact, there was no duty whatsoever on the part of the defendant to act as counsel to the plaintiff's attorney, and the defendant's counsel in simply omitting to file the papers, was acting under very good advice, *i. e.*, the Clerk of the Court, in believing that the plaintiff would thereby be obliged to commence a new action.

Counsel further believes that the papers submitted with the respondent's answer show conclusively that the plaintiff's attorney either knew or should have known that the summons was void long before the Statute of Limitations ran against her action.

The respondent's answer shows a notice of appearance or the answer must be filed. The summons must be issued by the Clerk and filed after service (Affidavit of B. Lincoln Benedict, the Clerk, at p. 13).

The affidavit of the Clerk shows that for the past thirty years the rules and practice of the Circuit Court for the Eastern District of New York have required the filing of any appearance to render it valid, and that such rules and regulations have been complied with (p. 13). The rules printed show that the pleadings shall be filed and especially that the appearance must be filed. Rule 8 provides for the entering in the books of the Clerk of the Court of the appearance in an action by the defendant after the filing of the summons with proof of service (p. 13).

The rule further provides that the plaintiff cannot compel the filing of the defendant's answer until after the filing of the declaration or complaint (pp. 13 and 14).

The rule states that, after the filing of the declaration an order may be entered requiring the defendant "to plead thereto within twenty days or

that his default be entered." This clearly shows that the answer must be treated the same as the declaration, which has to be filed.

The rule even speaks of the default on the part of the plaintiff to plead as being entered, showing that the entire record is required in the office of the Clerk.

Rule 35 provides that in order to amend a copy of the amended pleading (either complaint or answer) *shall be filed* and a notice to plead or answer shall be from the day of the service of a copy of the pleading as amended and *on file* (p. 14).

Certainly if an amended pleading must be filed, the original pleading must be.

The summons printed and issued by the Circuit Court reads: "You are hereby summoned to answer the complaint in this action and *to file your answer* and serve a copy thereof," &c. (p. 15).

On the other hand the petitioner claims that Section 914 of the Revised Statutes providing that

> "the practice, pleadings and forms and modes of proceeding in cases in the Circuit Courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the Courts of Record of the State, within which such Circuit Courts are held, any rule of the Court to the contrary notwithstanding,"

is controlling and by reason thereof the practice of the State Courts in New York which do not require the filing of the notice of appearance or answer is the practice governing this case. This contention is legally unsound as shown by many decisions referred to later where the point is more elaborately discussed.

The respondent disputes that the State Court practice does not require the filing of a notice of appearance or answer.

Section 824 of the Code of Civil Procedure of the State of New York provides,

> "The summons and each pleading in an "action *must be filed with the Clerk* by "the party in whose behalf it is served, "within ten days after the service thereof. "If the party fails so to file it, the adverse "party on proof of failure, is entitled, with- "out notice, to an order from a Judge that it "be filed within the time specified in the or- "der or be deemed abandoned."

Section 914, U. S. Revised Statutes, is not controlling.

Counsel for the petitioner has overlooked Section 918 of the Revised Statutes of the United States, providing as follows:

> "The several Circuit Courts may from "time to time and in any manner not incon- "sistent with any law of the United States or "with any rule prescribed by the Supreme "Court, make rules and orders directing the "returning of writs and process, the filing of "pleadings, the taking of rules, the entering "and making up of judgments by default and "other matters in vacation, and otherwise "regulate their own practice as may be "necessary or convenient for the advance- "ment of justice and the prevention of delays "in proceedings."

This section immediately follows the section providing for the practice in the Circuit and District Courts in equity and admiralty cases, and therefore applies solely to what the Circuit Courts may do regarding the rules providing for the filing of pleadings *in common law actions.*

As this section has not been repealed, Section 914 must be construed in connection with it. Further than that the Court's attention is directed to the wording of Section 914, which is not as counsel for the petitioner seems to contend, a peremptory direc-

tion that the practice in the United States Circuit Court shall be the same as in the State court, but in the language used shall "conform as near as may be."

The Supreme Court in the case of *Southern Pacific Co.* vs. *Denton, 146 U. S. Supreme Court Reps., page 945*, construed this language in a case having many points in similarity to the one at bar. There the State court statutory provisions made an appearance limited in terms a waiver of lack of jurisdiction of the Court, and this Court held that the State statute regarding what constitutes a notice of appearance and its effect, did not control notwithstanding Section 914 of the Revised Statutes. In other words, a defendant who was beyond the jurisdiction of the Court by reason of his residence, and who had served a limited notice of appearance which under the State statutes was sufficient to give the Court jurisdiction, was held not to have appeared in the action because the law of the United States courts differed from that of the State courts.

The opinion said in part:

> "But the question in this case is not of the validity of those provisions (State statute making service of a limited notice of appearance sufficient to give jurisdiction of the State court over the person of the defendant) as applied in the courts of the State, but whether they can be held applicable to actions in the courts of the United States; this depends on the true construction of Revised Statutes, § 914 (quoting it in full). In one of the earliest cases that arose under this act, the Court said: 'The conformity is required to be "as near as may be"—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress undoubtedly expected they would do, any subordinate provision in such State statutes which in their judgment would

> unwisely encumber the administration of the law or tend to defeat the ends of justice in their tribunals' (Indianapolis & St. L. R. Co. *v.* Hurst, 93 U. S., 291). * * * And whenever Congress has legislated upon any matter of practice and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. * * * Congress cannot have intended that it should be within the power of a State by its statutes to prevent a defendant, sued in a circuit court of the United States in a district in which Congress has said that he shall not be compelled to answer, from obtaining a determination of that matter by that court in the first instance, and by this court on a writ of error. To conform to such statutes of a State would 'unwisely encumber the administration of the law,' as well as 'tend to defeat the ends of justice' in the national tribunals. The necessary conclusion is that the provisions referred to in the practice act of the State of Texas, have no application to actions in the courts of the United States."

In that case the point turned on a provision in the State statute that there was no such thing as a special or limited notice of appearance, while the United States Court practice created without statute or rule of Court, was to the contrary.

In this case the State statute says that appearance shall consist of the service of a notice of appearance or answer, while the rules and practice of the United States Court hold that it must be by the service and filing of notice of appearance or answer. In the present case the United States rule is simply a little broader and more carefully protects the rights of parties than the State court rule, and is not necessarily inconsistent with it, while in the case referred to, So. Pac. Co. *v.* Denton, the United States practice was deemed to wipe out in its entirety a statute of the State court.

Counsel cannot conceive a more parallel case, and it would seem decisive of the issue raised here. It

is the almost universal practice in the courts of this country that an appearance must be entered with the Clerk of the Court, and Section 924 of the New York Code of Civil Procedure provides that the summons and each pleading "must be filed with the Clerk by the party in whose behalf it is served." Where there is any difference, then, the United States Court practice must govern under Section 918 of the Revised Statutes, and the rules, regulations and practice of the United States Court, as shown by the affidavit of Mr. Benedict, the Clerk.

Counsel conceives that this argument answers every point raised by the petitioner, but as a matter of safeguard he desires to refer to the decisions quoted by the petitioner in the brief in support of the petition for the issuance of the rule herein.

POINTS.

I.

The petitioner's first point in that brief was that a voluntary appearance under the State court practice gives jurisdiction though the process is void, and the defendant did not know of the defect. This is diametrically opposite from the law of New York State as it exists to-day.

It is true that at the beginning of the 19th Century some such harsh rule was laid down. As an illustration may be cited the case of *Pixley* vs. *Winchel*, 7 Cowan, 366 (1826), the head-note of which reads "Where a defendant appears though the process is void, and he is ignorant of this fact at the time of appearance, the Court will not afterwards set that or the subsequent proceedings aside."

This case with many others cited by the petitioner, were decided before the sections of the Code under which the petitioner claims, were enacted and have not been the law of this State for twenty years or more.

The only recent cases cited in support of the petitioner's first contention were *In re Johnson*, 167 U. S., 124, which counsel cannot see relates to any point involved, and *Barnes* vs. *Western Union Telegraph Company*, 120 Fed. Rep., 555, which counsel conceives to be a decision favorable to the respondent. A part of the opinion is as follows:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity. * * * He is not considered as abandoning his objection because he does not submit to further proceedings without constestation. It is only where he pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived."

The essence of this decision is that a defendant, knowing of a defect in the proceedings, must raise only that issue and not go into the merits; otherwise he will have waived the defects in the jurisdiction.

So here, if the defendant knew of the void summons, he could not appear in the action and plead to the merits without being held to waive the defect.

The cases counsel will refer to later, show conclusively that a party learning for the first time of a defect in the process, is not estopped by what he had already done in an action, but can withdraw his appearance. Hence *a priori*, if he has not fully appeared he cannot be forced to complete his appearance.

In the case of *Farmers and Merchants' St. Bank* v. *Stringer*, *75 App. Div.*, *127*, a summons without the endorsement as to the nature of the suit required by Section 1897 of the Code of Civil Procedure, was served upon the defendant, who in ignorance of the fact that suit was brought to recover a penalty, caused a notice of appearance to be served.

The service of the notice of appearance was sufficient under the State court practice to constitute an appearance in the action, and upon showing that he had been deceived by the summons served, he was allowed to withdraw a complete appearance made by him.

See also

Lassen v. *Aronson*, 21 N. Y. Supp., 452,

And *United States* v. *Riley*, 88 Fed. Rep., 480,

where a defendant was not allowed to withdraw a complete appearance simply because the Court held that when he so appeared in the action he knew of the defect in the summons.

II.

The petitioner's second point was that if the appearance was sufficient in New York, it was sufficient in the United States court, there being no statute or rule to the contrary.

It has already been argued at length that the United States practice and rules and statutes are to the contrary, and shown that the practice in the State court does not govern.

Under this point the petitioner refers to the cases of *Reed* v. *Chilson et al.*, 142 N. Y., 155; *Bissell* v. *N. Y. Central & H. R. R. R. Co.*, 67 Barb., 385; *Crown Cotton Mills* v. *Turner*, 82 Fed. Rep., 387; *Delisser* v. *N. Y. & New Haven R. R.* 59, Superior, 233; *Farmers' Bank* v. *Stringer*, 75 App. Div., 129.

In the Reed *vs.* Chilson case it was held that a party having full knowledge of the facts, serving a general appearance and answering to the merits, waived any right to object to the jurisdiction of the Court. This was all that the Court held in the

Reed *vs.* Chilson case, as shown by the decision of Wood *vs.* Furtick, 17 Misc., 564, where Mr. Justice Bischoff in writing his opinion, refers explicitly to the ruling in the Reed case.

Counsel admits that the decision of Bissell *vs.* N.Y. Central & Hudson River R. R. Co. (1872) is against the respondent. That case holds that a notice of appearance served in ignorance of a defect in the summons, cures that defect. The only difficulty with the decision which counsel can find, is that it has been overruled many times as in United States *v.* Riley, 88 Fed. Rep., 482, and particularly in the case of Farmers' Bank *v.* Stringer, 75 App. Div., 127 (1902), where the exact opposite of the doctrine was held to be the present law of New York State.

The Crown Cotton Mills vs. *Turner*, cited as support for the petitioner's position, is believed by the respondent to favor him. The head note reads:

> "The filing of a general appearance in a federal Court in an action commenced by service of summons alone is no waiver of defendant's right to move to dismiss for want of jurisdiction, when, on the subsequent service of the complaint, it for the first time appears that the only ground of federal jurisdiction is diverse citizenship and that the action is brought in the wrong district."

The decision is by Mr. Justice Lacombe in an action in the Circuit Court for the Southern District of New York, and seems to counsel to be authority for the following propositions:

1. The appearance is filed in the United States Circuit Court for the Southern District of New York, instead of not being filed as claimed by the petitioner on page 11 of the petition.

2. That a deception of a defendant by the act of the plaintiff does not deprive the defendant of his relief, nor make the service binding.

3. That after the completion of the appearance (by filing) the defendant must move for relief, and hence, by implication, if appearance has not been fully made he can simply rest on the failure of the plaintiff to bring him into court.

Mr. Justice Lacombe in writing the opinion, says:

> "There seems to be manifest unfairness in holding that defendant has waived rights of which he was not advised, when his ignorance is the necessary consequence of plaintiff's own act."

Counsel urges the forceful language of Judge Lacombe as a protest against the position taken by the petitioner that the result of her own wrong shall inure to her benefit.

If the petitioner's position is correct, then willful fraud, deliberate forgery, or other wrong bringing a party into court, is equally effective with the lawful service of proper court process.

There is an amusing case reported in the 13th Hun (New York State), page 157, where a man, who, after giving some spiritual seances, attempted to get a license. He went to the City Clerk, and was told by the Clerk that if he was in a hurry, to go with him to the magistrate. The Clerk told the Justice, "This is the man that held spiritual circles," and the plaintiff volunteered, "Yes, I am the man." The Justice then asked whether he had taken money at the door, and he replied that he had taken a collection from the audience, whereupon the Police Justice said to the plaintiff, "You have violated one of the penal ordinances of the city, and I fine you fifty dollars or ninety days in the county jail," and turned him over to the Chief of Police—presumably to recover from his astonishment at the speed with which rural justice moved.

In an action to recover back the amount paid by him in satisfaction of that judgment, the Appellate

Court somewhat naturally held that his appearance had not been a voluntary appearance (Merkee *v.* City of Rochester, 13 Hun, 157).

So here the defendant was tricked into a partial appearance, but no court will ratify and enforce that trickery, even though it may have been unintentional.

Of the other two cases cited by the petitioner, the case of Delisser *vs.* N. Y. & New Haven R. R. Co. is in no way in point, and the case of Farmers' Bank *vs.* Stringer reverses the Bissell case relied on by the petitioner.

III.

The petitioner urges that the defendant by appearing in court to oppose the application made by her, and especially in urging laches, thereby appeared in the action.

The absurdity of this contention appears on its face. The only way, says the petitioner, that the defendant could keep from submitting to the jurisdiction of the Court was to let the motion to compel him to submit to the jurisdiction, be granted by default; that if he opposed the motion, then the object of the motion was accomplished. She should have labeled her papers: "Motion to compel the defendant to oppose this motion."

As said in *Barnes* vs. *Western Union Telegraph Company, 120 Fed. Rep., 555*, "He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation." As to the defendant raising the point of laches, that would only aid the plaintiff, had the defendant urged laches as an answer to the plaintiff's suit for damages. Then he might well be held to have answered to the merits of the action. This he has never done.

The laches urged is laches tending to defeat the motion to compel the filing of the answer, and has

no relation or reference to the action for damages. If the defendant can oppose the motion to compel the filing of the answer, he can oppose it on every conceivable ground.

In support of this point the plaintiff cites *Farmer* vs. *National Life Ass'n of Hartford, 138 N. Y., 265*, which case counsel conceives does not assist her. On the contrary that case held that the rule as to what did not constitute an appearance in an action in the United States courts, need not be followed in the State courts. The Court of Appeals in that case laid down a specific rule diametrically opposite to the decisions of the United States court regarding what constitutes an appearance in an action. This case is therefore one more bit of evidence showing that what constitutes an appearance according to the State courts and the United States Courts holding in New York State, are not and will not be the same.

The basis of the Farmer decision was simply that a party who in an action commenced against him, makes a motion which is necessarily based on the fact of a proper action commenced is thereby estopped from denying the institution of that suit. In this case the defendant has never made any motion or asked for any relief in the action, but has confined his efforts to opposing applications by the petitioner.

In referring to the Farmer case, Mr. Justice Bischoff in Wood *vs.* Furtick, *supra*, said, "In the Farmer case the decision was not predicated of the fact of a general appearance by the defendant, but it was ruled that the defendant was estopped from denying that it had generally appeared and submitted to the jurisdiction of the Court because it had applied for and availed itself of relief to which it was entitled only after a general appearance in the action" (17 Misc., 564).

The case of *Payne* vs. *Galbraith, 38 App. Div., 68*, referred to by the petitioner, holds that the ob-

taining of a stipulation of time to answer by an attorney signing himself "Attorney for defendant," does not constitute an appearance but would probably estop him from denying jurisdiction as he could get such stipulation only after an appearance. In this case the defendant tried to get a stipulation while in ignorance of the defect in the summons, but was refused by an attorney who attempted to take his default and no extension was ever obtained to answer by him.

The adjournment of the motion to compel the filing of the answer could undoubtedly be done by the defendant if the defendant could oppose the motion at all.

As the vital point before the Court here is whether the appearance according to the State court practice is binding in the United States court, counsel desires to again refer to the matter.

He has already cited the Court of Appeals of the State of New York, showing that the New York State courts will not be governed by the decisions of the United States courts in New York defining an appearance.

Reference is now made to the United States courts. In the case of *Louden Machinery Co.* vs. *American Mal. Iron Co., 127 Fed. Rep., 1008 (Feb. 1904)*, the District Court of Iowa held that the United States District Court would not be bound by a State statute defining a notice of appearnce.

The Court said:

> "And Judge Shiras held in Elgin Canning Co. *v.* Atchison R. R., 24 Fed Rep., 866, 'that when the defendant filed a plea in the State court, that it was not amenable to suit and at the same time filed its petition for removal, the invalidity of the service was not waived. But in all such cases the question is not what the State court would hold but the question is what should this court hold which does allow special appearances. * * * In my opinion the State court did not acquire

> jurisdiction over the defendant and that defendant has not surrendered itself to the jurisdiction of either the State court or of this court. And it is for this court and this court alone to pass on those matters.'" (p. 1010).

In the case of *Goldie* vs. *The Morning News, 155 U. S., 518*, a part of the head note is as follows:

> "In a personal action brought in the State court against a corporation which neither is incorporated nor does business within the State, nor has any agent or property therein, service of a summons upon its president temporarily within the jurisdiction although good in the State courts, will not be held sufficient service upon the corporation in the United States Circuit Court, a court of a different government, although sitting in the same State."

The opinion in this case was written by Mr. Justice Gray in a case brought in the Supreme Court, Kings County (Brooklyn, New York City), and removed to the Circuit Court for the Eastern District of New York (the same court as this action was supposed to be pending in). The Court there ruled contrary to the Court of Appeals of the State of New York in two important points:

1. It held service made properly according to the State statute while it did not controvert any United States statute was still against the principle of the United States decisions, and would not be held binding in spite of 914 of the Revised Statutes, and 2. It held contrary to the decision of the Court of Appeals of the State of New York that an application to remove the action to the United States Court did not constitute an appearance.

In Barrow *vs.* Kane, 170 U. S., 110, Mr. Justice Gray, in writing the opinion, said:

> "But the jurisdiction of the Circuit Courts of the United States is not created by and

does not depend upon the statutes of the several States."

In *Cady* vs. *The Associated Colonies, 119 Fed. Rep., 420 (1902)*, part of the head note is as follows:

> "The authority of a Federal court into which a cause has been removed, to determine whether the State court by the service made acquired jurisdiction over the defendant, a foreign corporation, to render judgment against it, is neither derived from nor limited by the laws of the State; nor is such court concluded by the decision of the State court thereon."

From all these decisions, it would appear that if the State court had actually ruled in this case that what the defendant had done constituted an appearance, it would have no binding force and effect on the United States Circuit Court, and that the counsel for the petitioner has completely overlooked or misapprehended the force and effect of Section 914 of the United States Revised Statutes.

In this case Judge Thomas held that the defendant was forced into court by forgery of a United States document; that his appearance has never been completed; that he has never waived the defect and presumably that the attorneys for the plaintiff and petitioner were guilty of gross laches in failing to discover their mistake, and that they were advised by the Court itself through its Clerk at the time that the summons was all wrong.

Counsel desires to refer to but one more point, and that is that every application made by the petitioner has been an attempt to compel the filing of the defendant's answer.

While success in forcing the filing of the notice of appearance would have been claimed effective, still the attempt to get the answer on file shows conclusively that the petitioner recognized and always has recognized that the filing of the answer

or the notice of appearance is required by the United States Circuit Court.

In this very application before the Supreme Court she asks that the order denying the motion to compel the filing of the answer be stricken from the records, and that she be given the relief to which she is entitled.

Counsel does not know what will be contained in the affidavits to be filed in reply, but begs to refer to the papers which were before Judge Thomas in the court below and which are now with the Clerk of the United States Supreme Court.

Respondent submits that the petition for a writ of mandamus should be denied and the application dismissed.

Respectfully submitted,

ALVIN CUSHING CASS,
Counsel for Respondent.

Supreme Court of the United States.

No. 16, Original.—October Term, 1904.

Ex parte: In re Gertrude Glaser, Administratrix, Petitioner.

[May 8, 1905.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This is a petition by Gertrude Glaser, as administratrix, for mandamus, requiring the judges of the Circuit Court of the United States for the Eastern District of New York to take jurisdiction and proceed against Anthony P. Langer in a certain suit alleged by petitioner to be pending and undetermined in that court, wherein Gertrude Glaser, as administratrix, is plaintiff, and Anthony P. Langer is defendant, and to strike from the records of the court a certain order made on the 14th day of November, 1904, entitled: "'In the Matter of the Application of Gertrude Glaser, Administratrix, &c., to compel the filing of an answer, or other relief, in an action alleged to be pending between Gertrude Glaser, as Administratrix, &c., of Isador Glaser, deceased, Plaintiff, and Anthony P. Langer, Defendant,' whereby petitioner's application to compel the filing of said answer was denied, on the ground that no such action was pending, and to make such disposition of said suit as ought to have been made had said order not been made and entered therein . . ."

The petition alleged the commencement in the Circuit Court of a common law action by petitioner as administratrix against Langer, to recover damages for negligence causing the death of petitioner's husband, and rested the jurisdiction on diversity of citizenship. The circumstances in respect of a mistake, by reason of which no summons was issued, though service of copy was made, are set forth in detail, and the fact alleged of notice of appearance and answer, and the assertion by defendant's attorney that this was in ignorance of the defect in the summons.

Leave to file the petition was granted, and this having been done, a rule was entered thereon, to which the judge presiding in the Circuit Court, and before whom all the proceedings referred to in the petition were had, and by whom the decision was made, made due return, submitting his action in the premises, and certifying that his reasons for denying the motion were set forth in the order, which is given at length. It appears therefrom that the motion was denied "upon the sole ground that no action of Gertrude

Glaser, as administratrix of the goods, chattels and credits of Isador Glaser, deceased, plaintiff, against Anthony P. Langer, defendant, is nor ever has been pending in this court."

In cases over which we possess neither original nor appellate jurisdiction, we cannot grant mandamus. Rev. Stat. § 716; *In re Commonwealth of Massachusetts, Petitioner*, 197 U. S.

Of course there is no pretense of original jurisdiction here, and since the passage of the act of March 3, 1891, 26 Stat. 826, c. 517, we have no jurisdiction to review the judgments or decrees of the District and Circuit Courts directly by appeal or writ of error in cases such as this case if pending in the Circuit Court.

Rule discharged. Petition denied.

True copy.

Test:

Clerk Supreme Court, U. S.